

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 FEDERAL TRADE COMMISSION,

10 Plaintiff,

11 v.

12 AMAZON.COM, INC.,

13 Defendant.

No. 2:14-CV-01038-JCC

**AMAZON.COM, INC.'S  
SUPPLEMENTAL BRIEF REGARDING  
THE FTC'S CALCULATION OF  
MONETARY RELIEF**

NOTE ON MOTION CALENDAR:

Friday, June 17, 2016

ORAL ARGUMENT REQUESTED

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## I. INTRODUCTION

As the Court observed, the FTC’s request for an award of \$26.5 million is “too high.” Dkt. 224, at 22. One reason, among several, for the inflated figure is that the FTC would have the Court believe that *every* failed password attempt associated with an in-app purchase was made by a child. This assumption ignores the fact that adults also forget their passwords, change their minds, or lose interest when forced to navigate an unavoidable password prompt. While it generates a large figure, the FTC’s assumption belies human nature and common experience.

Careful (and conservative) analysis demonstrates that \$26.5 million is substantially beyond what can credibly be calculated to be appropriate monetary relief owed to Amazon customers who have not yet been refunded. That analysis confirms that the Court should either deny the FTC’s request in its entirety because the FTC failed to reasonably estimate relief or enter judgment for an amount substantially lower than the FTC’s request.

Should the Court conclude otherwise, the method that would correspond most closely to any legitimate claims is an appropriately designed notice-and-claim procedure with no overall monetary minimum or maximum. This approach would ensure that (1) deserving customers will be made whole and (2) the FTC will not receive a windfall recovery.<sup>1</sup> It would also dispense with the need to resolve the contentions about the amount of uncompensated “injury,” an effort that, even stripping out clearly counterfactual claims, will never be more than an estimation.

## II. DISCUSSION

After correcting for errors in the FTC’s estimate, the data demonstrate that any award of monetary relief even remotely near the FTC’s request is unwarranted.

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<sup>1</sup> Despite publicly stating that its goal is to “put that money back in consumers’ pockets,” 5/27/2016 Hanson Decl. ¶ 2 (7/11/2014 FTC Interview with CNN), the FTC now asks that the Court permit the FTC in its sole discretion to refund some or all of any monetary relief to consumers, to use some or all of it for “other equitable relief . . . it determines to be reasonably related to practices alleged in the Complaint,” or deposit some or all of it “to the U.S. Treasury as disgorgement,” FTC Proposed Order and Judgment (Dkt. 98-1), at 6.

1     **A.     The FTC’s Estimate of Monetary Relief Is Substantially Inflated**

2             **1.     Corrections to the FTC’s Estimate of Monetary Relief**

3             The FTC first requested \$26,242,025 in equitable monetary relief, Dkts. 109, 182,  
4     and increased its request to \$26,541,207 based on its estimate of additional transactions on the  
5     first-generation Kindle Fire not subject to a password, Dkt. 235. For the reasons discussed here  
6     and in the Declarations of Jonathan Werner filed February 22, 2016 (Dkt. 168) (“2/22/2016  
7     Werner Decl.”) and April 20, 2016 (Dkt.220-1) (“4/20/2016 Werner Decl.”), the FTC’s estimate  
8     is vastly inflated and reflects the same unrealism and overreach that accompanied its request for  
9     a permanent injunction.

10            **a.     Corrections to the FTC’s Estimate of Potentially Relevant Revenue**

11            The FTC’s first categorical error lies in overstating the pool of potentially relevant  
12    revenue. The FTC starts with in-app purchasing data for approximately 6,000 “high-risk” apps,  
13    after excluding purchases (1) within casino apps; (2) subject to a high-price password; (3) subject  
14    to other passwords if reflected in “metric-events” data; or (4) completed after June 3, 2014, other  
15    than those made on the first-generation Kindle Fire. *See* Miller Decl. (Dkt. 110) ¶¶ 6-10; Supp.  
16    Miller Decl. (Dkt. 183) ¶ 3. This pool of transactions improperly includes purchases that were  
17    unlikely to have been made by children.

18                    **(i)     Exclude Purchases Within Adult-Oriented Apps**

19            The FTC misleadingly refers to its estimate of more than \$86 million of  
20    potentially relevant revenue as “in-app charges incurred without password entry in kids’ apps.”  
21    FTC SJ Mot. (Dkt. 109), at 28. In fact, even after the FTC’s exclusion of casino apps, the  
22    remaining pool of transactions includes purchases within apps that are not of interest to children  
23    or are played in significant numbers by adults and teens. *See* 2/22/2016 Rubenson Decl. (Dkt.  
24    171) ¶¶ 3.2-3.3 & Exs. A-F. To address this issue in part, Amazon has identified additional apps  
25    not likely to be of interest to children. Thus, Amazon has excluded (1) apps rated adult or  
26    mature; (2) apps classified in categories not likely of interest to kids, such as personal finance or

1 navigation;<sup>2</sup> and (3) other specific apps with violence or problem-solving characteristics that  
2 likely are played by adults and teens,<sup>3</sup> not by kids “with little or no understanding of money” or  
3 confused about “[v]irtual items that cost money.” *See* FTC SJ Mot. (Dkt. 109), at 2. Application  
4 of this correction reduces the FTC’s revenue estimate by [REDACTED] (to [REDACTED]).  
5 5/27/2016 Werner Decl. ¶ 8 & Ex. A. Critically, this exclusion merely targets apps not of  
6 interest to kids. A substantial portion of the remaining apps, even if enjoyed in part by children,  
7 are also played by large numbers of adults and teens.<sup>4</sup>

8 **(ii) Exclude Purchases After Customer’s First Refund**

9 When customers contacted Amazon by phone, email, or chat to request a refund  
10 for an accidental or “unauthorized” in-app purchase, Amazon customer-service agents issued  
11 refunds in the overwhelming majority of cases and also educated customers about Parental  
12 Controls. 2/2/2016 Pieros Decl. (Dkt. 96) ¶¶ 3-4; *see also* 2/22/2016 Werner Decl. (Dkt. 168)  
13 ¶¶ 16-17. Amazon’s agents not only instructed customers how to enable Parental Controls to

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14 <sup>2</sup> Amazon also excluded the following app categories: accounting, books (other than comics), magazines  
15 (other than Dirt Wheels Magazine and Celebrations), meditation, relationships, productivity, travel, utilities, and  
16 weather. 2/22/2016 Werner Decl. (Dkt. 168) Ex. B.

17 <sup>3</sup> The thirty specific apps excluded on this basis, such as “Crime City” and “Gun Zombie: Hell Gate,” are  
18 identified in Exhibit B of the 2/22/2016 Werner Declaration (Dkt. 168); *see also* 5/27/2016 Werner Decl. Ex. C (app  
19 detail pages for the thirty specifically excluded apps).

20 <sup>4</sup> *See* 2/22/2016 Rubenson Decl. (Dkt. 171) ¶¶ 3.2-3.3 & Ex. C (2013 Nielsen Study) (“Unlike popular  
21 belief that the heaviest [app] gamers will consist of a majority of younger smartphone users, nearly half (45 percent)  
22 of all heavy gamers are aged between 25 and 35 years of age . . . . Also, one fourth of all heavy [app] gamers are  
23 over 35 years of age.”), Ex. E (2015 Mobile Gaming Study) (“Youngsters are not the biggest consumers of mobile  
24 games. In fact, parents are more likely to be gamers than their children. . . . The findings of this study reveal a  
25 direct correlation between the amounts of money spent on virtual goods within social games and gamer age – the  
26 older the gamer, the more they spend.”). For example, the FTC includes in-app purchases within universally  
popular apps like Angry Birds, Subway Surfers, the Simpsons, and NFL Pro, even though these apps are played by  
large numbers of adults. *See id.* Ex. A (“Nielsen reveals most popular Android apps by age. Angry Birds appeals  
most to over 35s.”). In fact, *hundreds* of customer reviews for just the five apps on the FTC’s list with the highest  
refund amounts confirm that those apps are played by significant numbers of adults. 5/27/2016 Werner Decl. ¶ 34  
& Ex. D.

The FTC’s estimate ignores this crucial characteristic of apps included in its analysis. Amazon’s reduction  
of [REDACTED] to the FTC’s revenue estimate, therefore, is exceedingly conservative in favor of the FTC because a  
substantial portion of those remaining sales were made by adults or teenagers, not children.

1 require a password but also sent follow-up emails with those instructions. 2/2/2016 Pieros Decl.  
2 (Dkt. 96) ¶ 4. Because customers who received such a refund were directly informed of in-app  
3 purchasing opportunities and how to prevent them with Parental Controls, it would be  
4 unreasonable to hold Amazon responsible for any subsequent in-app purchases made by these  
5 fully informed customers. Thus, Amazon's corrected estimate excludes purchases made after the  
6 date a customer received a first refund for an in-app purchase. 5/27/2016 Werner Decl. ¶ 11.  
7 This correction reduces the amount of potentially relevant revenue by [REDACTED] (to  
8 [REDACTED]). *Id.* ¶ 11 & Ex. A.

9 (iii) **Exclude Purchases After Customer's First FreeTime Activity**

10 Similar to Parental Controls, Amazon's Kindle FreeTime is a comprehensive  
11 child tablet-management solution that automatically disallows any and all in-app purchasing.  
12 2/2/2016 Rubenson Decl. (Dkt. 95) ¶ 20. To begin using FreeTime, a user creates a child profile,  
13 which requires entry of an existing Parental Controls password or the creation of one. *See*  
14 2/22/2016 Werner Decl. (Dkt. 168) ¶ 11(c). As a result, it would be inappropriate to include  
15 among allegedly "injured" consumers those customers who were aware of and had in fact  
16 previously used FreeTime (and Parental Controls). Amazon therefore excludes in-app purchases  
17 made by a customer after the date of initial FreeTime activity on that customer's account.  
18 5/27/2016 Werner Decl. ¶ 12. That correction reduces the amount of potentially relevant  
19 revenue by an additional [REDACTED] (to [REDACTED]). *Id.* ¶ 12 & Ex. A.

20 (iv) **Exclude Late-Night Purchases**

21 The FTC's estimate is also overinclusive because it includes in-app purchases  
22 completed when children are likely asleep (i.e., such purchases would overwhelmingly be made  
23 by adults). As a conservative correction to address this problem, Amazon has excluded  
24 transactions made between 11 p.m. and 3 a.m. Pacific Time.<sup>5</sup> 5/27/2016 Werner Decl. ¶ 13. The

25 <sup>5</sup> In the data the parties are using to estimate potential relief, the time of purchase is for the Pacific Time  
26 zone, not necessarily the local time zone of the customer. 5/27/2016 Werner Decl. ¶ 13.

1 resulting revenue reduction is [REDACTED] (to [REDACTED]). *Id.* ¶ 13 & Ex. A.

2 (v) **Exclude Purchases After Parental Controls Enabled**

3 In late December 2013, Amazon began collecting “metric-events” data that  
4 records password-related activity associated with in-app purchases. 6/29/2015 Bhatt Decl.  
5 (Dkt. 34) ¶¶ 4-5. For example, the data indicate which password prompt was presented, if any,  
6 and whether a purchase was successfully completed. *Id.* ¶ 4. Because of the nature of, and the  
7 way Amazon collects, metric-events data, not all metric-events data for completed orders are  
8 successfully transmitted to and recorded by Amazon. *Id.* ¶ 8; 4/20/2016 Werner Decl. (Dkt.  
9 220-1) ¶ 10(f). For example, metric-events data are not collected by Amazon in “real-time” but  
10 instead are stored on a customer’s device and periodically transmitted to Amazon’s servers if and  
11 when certain technical conditions are satisfied. 6/29/2015 Bhatt Decl. (Dkt. 34) ¶ 8.

12 The metric-events data produced by Amazon identify a subset of instances in  
13 which, beginning in late December 2013, a customer was presented with a Parental Controls  
14 password, meaning they had *enabled* Parental Controls and were therefore necessarily aware of  
15 the availability of that feature to protect against unwanted in-app purchases. 5/27/2016 Werner  
16 Decl. ¶ 14. For such customers, Amazon has excluded purchases made after the first Parental  
17 Controls password prompt. This restriction reduces the pool of potentially relevant revenue by  
18 [REDACTED] (to [REDACTED]). *Id.* ¶ 14 & Ex. A. This correction is also conservative given the  
19 incompleteness of the data, including the fact that none cover the period before December 2013  
20 even though Parental Controls were available since launch in November 2011.

21 (vi) **Exclude Additional Purchases Subject to Passwords**

22 The FTC also underestimates transactions subject to a password. Although the  
23 FTC excluded purchases subject to the high-price password prompt (i.e., based on prices in sales  
24 data), the FTC excluded only a subset of orders subject to other password prompts (i.e., only  
25 specific orders with associated metric-events data indicating a successful password purchase).  
26 Miller Decl. (Dkt. 110) ¶¶ 6-7, 9. There is no basis for ignoring additional transactions subject to

1 “non-price” passwords (i.e., first-order, Parental Controls, high-risk, and high-frequency  
2 prompts). A customer who successfully entered a password obviously was not injured.

3 To address this deficiency, for each month in 2014 through June 3, Amazon  
4 calculated the percentage of sales *with* metric-events password data that were subject to a non-  
5 price password. 5/27/2016 Werner Decl. ¶ 15. Then, as reflected in Table 1 in the May 27  
6 Werner Declaration, Amazon applied these percentages to the corresponding amount of  
7 transactions *without* metric-events data to estimate additional 2014 password purchases beyond  
8 those excluded by the FTC. *Id.* ¶ 15 & tbl. 1. Applying these estimates of additional password  
9 purchases in 2014 reduces the amount of potentially relevant revenue by an additional  
10 [REDACTED] (to [REDACTED]). *Id.* ¶ 15 & tbl. 1, Ex. A.

11 Even with that correction to sales in 2014, however, the FTC’s analysis still  
12 underestimates password-enabled purchases because it ignores the fact that those non-price  
13 password prompts were also in place between May and December 2013. 5/27/2016 Werner  
14 Decl. ¶ 16. Amazon addresses this deficiency by taking the percentage of sales with metric-  
15 events data that were subject to a non-price password between January and June 3, 2014 (i.e.,  
16 approximately [REDACTED]) and applying it to the amount of potentially relevant revenue for the  
17 period May 2013 through December 2013 for all applicable devices [REDACTED]. *Id.* ¶¶ 15-16  
18 & tbl. 1. This additional correction further reduces potentially relevant revenue by [REDACTED]  
19 (to [REDACTED]). *Id.* ¶ 16 & Ex. A.

20 It bears noting that the password estimates above are still conservative in nature,  
21 and thus favor the FTC, because they do not attempt to estimate purchases (1) on the first-  
22 generation Kindle Fire at any point since November 2011 that were subject to the Parental  
23 Controls password, (2) on other devices prior to May 2013 that were subject to the Parental  
24 Controls password, or (3) on other devices between February and April 2013 that were subject to  
25 the high-frequency password. 4/20/2016 Werner Decl. (Dkt. 220-1) ¶ 10(g).  
26



(vii) **Additional 99-Cent Sales on First-Generation Kindle Fire**

In its May 9 supplemental submission, the FTC contends that an additional [REDACTED] should be included in the pool of potentially relevant revenue based on its estimate of 99-cent in-app purchases on first-generation Kindle Fire tablets between January 2015 through April 2016. *See* Dkt. 235 ¶¶ 5, 7. The estimate is wrong, however, because it is based on sales within *all* apps; it is not limited to the “high-risk” apps used by the parties elsewhere to identify revenue potentially relevant to the claim in this case. 5/27/2016 Werner Decl. ¶ 17.

To correct for this overstatement, Amazon estimated the amount of relevant transactions *within “high-risk” apps* as a percentage of relevant transactions *within all apps*. 5/27/2016 Werner Decl. ¶ 17. To be conservative, Amazon’s analysis uses the *highest* monthly percentage during the most recent 6-month period for which data were produced [REDACTED] to estimate the amount of later sales within “high-risk” apps. *Id.* Applying that percentage to corresponding sales across all apps for December 2014 through December 2015 [REDACTED] and the FTC’s estimate for January through April 2016 [REDACTED] equals [REDACTED].<sup>6</sup> *Id.*; *see also* 2/22/2016 Werner Decl. (Dkt. 168) Ex. F; 5/9/2016 FTC Filing (Dkt. 235) ¶ 7. Adding [REDACTED] to the corrected total above results in [REDACTED] in potentially relevant revenue. *Id.* ¶ 17 & Ex. A. It is against this figure, not the FTC’s inflated [REDACTED] estimate, that any “failure rate” should be applied.

The FTC also requests additional monetary relief from May 2016 onward for 99-cent purchases on the first-generation Kindle Fire “because these charges are ongoing and the date on which the Court will enter its final order in this case is uncertain.” Dkt. 235 ¶ 8. This request is moot. On May 6, Amazon voluntarily began requiring a password for *all* in-app purchases on the first-generation device, lowering the existing password threshold from \$1 to

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<sup>6</sup> The parties’ analyses already include 99-cent sales on the first-generation tablet through December 1, 2014, which – based on agreement by the parties in discovery – is the end date for the transactional data used for the bulk of the parties’ analyses. In its May 9 filing, the FTC did not include December 2014 sales under \$1 on the first-generation tablet. *See* Dkt. 235. For the adjustment applied in this section, Amazon has included December 2014.

1 zero. 5/27/2016 Werner Decl. ¶ 32. As a result, there are *no ongoing sales* on the first-  
2 generation tablet that are relevant to the FTC’s request for monetary relief.<sup>7</sup>

3 **b. Corrections to the FTC’s “Unauthorized Charge Rate”**

4 The FTC’s second categorical error is its estimate of an “Unauthorized Charge  
5 Rate” [REDACTED], which it applies to its inflated estimate of potentially relevant revenue to calculate  
6 alleged injury.<sup>8</sup> Amazon’s analysis attempts to correct for some of this error.

7 **(i) The FTC’s “Unauthorized Charge Rate” Is Implausible**

8 The FTC’s estimate of an “Unauthorized Charge Rate” is flawed because it is  
9 based on the implausible assumption that *all* failed password attempts in the data were attempts  
10 by a child to make an in-app purchase and who, absent the password prompt, “otherwise would  
11 have incurred an unauthorized charge.” FTC SJ Mot. (Dkt. 109), at 28; *see also* Dkts. 167, 168,  
12 220-1 (Amazon’s critiques). The FTC’s estimate assumes, for example, that *none* of the failures  
13 in the data are adults who forgot their passwords, adults (or children) who chose to abandon their  
14 transactions, children who had permission but forgot their parents’ passwords, technical failures,  
15 or other reasons unrelated to unauthorized attempts by a child.

16 This assumption is not only unfounded on its face but Amazon’s data also  
17 demonstrate it is unreliable. The failure rate for password prompts in *adult-oriented* apps (i.e.,  
18 casino apps and the additional adult-oriented apps excluded in Amazon’s analysis) is [REDACTED] which  
19

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20 <sup>7</sup> In its May 9 submission, the FTC notes that customers may purchase first-generation Kindle Fire tablets  
21 on Amazon’s website. Dkt. 235 ¶ 6. These *used* or *refurbished* tablets are offered for purchase through Amazon’s  
22 *third-party seller* program or, on occasion, Amazon Warehouse Deals. 5/27/2016 Werner Decl. ¶ 32. In any event,  
23 potentially relevant in-app purchases on these devices are included in the parties’ remedy analyses.

24 <sup>8</sup> To arrive at its estimate of an “Unauthorized Charge Rate,” the FTC relied on password metric-events  
25 data for (1) completed, “successful transactions,” and (2) instances in which a password prompt was presented, but  
26 an order was not successfully completed (which for convenience are referred to below as “password failures,”  
“failed transactions,” or “failures,” but which critically are not limited to incorrect password entry). Miller Decl.  
(Dkt. 110) ¶¶ 10, 13; 2/22/2016 Werner Decl. (Dkt. 168) ¶¶ 8, 10. The FTC limited its password analysis to  
transactions associated with high-risk, high-price, and high-frequency password prompts. Miller Decl. (Dkt. 110)  
¶¶ 10, 12. The FTC calculated its estimated “Unauthorized Charge Rate” by dividing the number of failed  
transactions by the sum of successful and failed transactions, or F/(F+S). *Id.* ¶¶ 12-13.

1 is *identical* to the FTC’s “Unauthorized Charge Rate” for children. 4/20/2016 Werner Decl.  
2 (Dkt. 220-1) ¶ 12. In other words, Amazon’s data show that adults forgot their passwords,  
3 abandoned their transactions, or had technical failures *at the same rate* the FTC estimates for  
4 children. If the FTC’s critical assumption is correct that no adult attempts were included in its  
5 “Unauthorized Charge Rate,” the failure rate for adult-oriented apps would be much lower or  
6 *even zero*. It would be statistically incomprehensible for adults to input their passwords without  
7 fail for one set of apps and not for another, yet that is what the FTC’s estimate assumes. These  
8 data starkly demonstrate that there is no logical or evidentiary basis for assuming that every  
9 failed password prompt was an unauthorized attempt by a child. As a result, the FTC has failed  
10 to carry its burden of “proving that the amount it seeks in restitution reasonably approximates the  
11 defendant’s unjust gains.” *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016).  
12 This failure is fatal to the FTC’s request for monetary relief.

13 (ii) **Corrected “Unauthorized Charge Rate”**

14 To address in part the FTC’s grossly inflated estimate of an “Unauthorized  
15 Charge Rate,” Amazon applied three corrections described below.<sup>9</sup> However, even these  
16 corrections do not address the entirety of the FTC’s error because it is impossible to tell from the  
17 data whether a password blocked a child’s rather than an adults’ attempted purchase.

18 (a) **Customers Who Chose No Password for Future**  
19 **Purchases When Presented with June 2014 Prompt**

20 As a first step to identify attempted transactions not likely to be by children,  
21 Amazon identified all password failures by a customer who explicitly chose *not* to require a  
22 password for future in-app purchases in response to the June 2014 first-time purchase prompt.  
23 5/27/2016 Werner Decl. ¶ 19; *see also* Dkt. 93, at 15-16 & Fig. 8 (discussing June 2014 prompt).

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24 <sup>9</sup> Consistent with the global restrictions discussed above, Amazon first modified the FTC’s universe of  
25 password metric-events data by excluding transactions and attempted transactions within the additional apps  
26 excluded by Amazon and those made between 11 p.m. and 3 a.m. PT. 5/27/2016 Werner Decl. ¶ 18. The failure  
rate after these two modifications is [REDACTED]. *Id.*

1 Those customers opted out of a password for any number of reasons (e.g., because they did not  
2 have children, did not share their device with children, or were otherwise not concerned by  
3 unauthorized purchases by kids), but the point is they made that conscious election when  
4 presented with the prompt. Amazon therefore excludes all such customers' failed purchase  
5 attempts from the pool of failures the FTC presumes were unauthorized attempts by a child.  
6 Because the data cover only a limited period and are incomplete, this correction reduces the  
7 estimated "Unauthorized Charge Rate" a modest amount (to [REDACTED]). *See id.* ¶ 19 & Ex. A.

8 (b) **Customers Who Had Parental Controls Disabled**  
9 **After Presented with May 2013 Prompt**

10 Based on the same rationale, all failed attempts by customers who had Parental  
11 Controls disabled after being presented with the May 2013 first-time purchase prompt should be  
12 excluded from the "Unauthorized Charge Rate." 5/27/2016 Werner Decl. ¶ 20. The May 2013  
13 first-time purchase prompt, which required entry of a password to complete the purchase,  
14 included the following notice immediately below the password-entry box: "If you'd like to  
15 require a password for future in-app purchases, please turn on Parental Controls." Dkt. 93, at 13  
16 & Fig. 5. The term "Parental Controls" was a hyperlink for the user to easily enable the  
17 protection. *Id.* It is reasonable to infer that customers presented with the May 2013 first-time  
18 purchase prompt who did not enable Parental Controls very likely did not have children, did not  
19 share their device with children, or were otherwise unconcerned about unauthorized in-app  
20 purchases by a child.<sup>10</sup> The FTC, by contrast, assumes that *all* password failures for these same  
21 customer accounts were unauthorized attempts by a child, despite the fact those account holders  
22 elected not to enable Parental Controls. That unreasonable assumption should be rejected.<sup>11</sup>

23 <sup>10</sup> The refund data confirm the success of the May 2013 prompt. Refunds flattened shortly after  
24 implementation of the May 2013 prompt. *See* Amazon Opp. to FTC SJ Mot. (Dkt. 167), at 33 fig. 2.

25 <sup>11</sup> It is Amazon's position that the May 2013 first-time purchase prompt was equally effective as the June  
26 2014 prompt, which the FTC concedes complies with Section 5 of the FTC Act. Consistent with the Court's order,  
however, Amazon's analysis of potentially relevant revenue includes purchases through June 3, 2014 (and beyond  
for sales on first-generation Kindle Fire tablets). Application of the rate correction described in this section,  
however, presents a different question. Namely, are password failures by customers who were presented with the

Moreover, it would be unfair to hold Amazon responsible for purchases when customers are directly informed of and declined protection against those purchases. That is, after all, the “express, informed consent” the FTC has demanded.

For this correction, Amazon identified customers in the metric-events data who completed an order in response to the May 2013 first-time purchase prompt. 5/27/2016 Werner Decl. ¶ 21. Among those customers, Amazon identified those who were later presented with a high-price, high-frequency, or high-risk password, meaning they chose not to enable Parental Controls (which if implemented would have overridden the other prompts). *Id.* As with the correction in the preceding section, Amazon’s analysis treats all failed purchase attempts by these customers as instances other than unauthorized purchase attempts by a child, which further reduces the “Unauthorized Charge Rate” to [REDACTED]. *Id.* ¶ 21 & Ex. A.

**(c) Failed Transactions More Than 30 Days After  
Customer’s Initial Failed Transaction**

A third flaw with the FTC’s estimate of the failure rate is its use of data on password failures to draw inferences from data on successful orders without accounting for a fundamental difference between blocked and successful purchase attempts. The FTC’s analysis assumes that *all* unsuccessful purchase attempts reflected in the password data represent an unauthorized purchase attempt by a child that would have been completed had it not been blocked by a password challenge. The FTC then takes the failure rate it calculated from the password data and applies it without modification to its estimate of revenue from orders that it deems were not subject to a password, contending that the result represents unauthorized purchases by children.

The FTC’s analysis ignores a pivotal distinction between a password-blocked

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May 2013 first-time purchase prompt and declined to enable Parental Controls more likely to be (1) failed attempts by children without parental authorization – the FTC assumes *all* are – or (2) failures by adults, for technical reasons, or for any of the other many reasons unrelated to unauthorized purchase attempts by a child? The latter is far more likely for customers matching this profile.

1 purchase attempt by a child and an unauthorized purchase. 5/27/2016 Werner Decl. ¶ 23. A  
2 parent is unlikely to learn of a password-*blocked* purchase attempt because no charge is incurred.  
3 *Id.* But every *successful* in-app purchase by a child (or otherwise) results in an immediate order-  
4 confirmation email sent to the Amazon account holder (e.g., parent) and each purchase would be  
5 included as a separate line item on the account holder's credit- or debit-card statement. *Id.* By  
6 counting all password failures as would-be purchases by a child, the FTC unreasonably assumes  
7 that a parent would ignore all of these notices or watch passively and helplessly in perpetuity as  
8 unauthorized purchases pile up (no matter how many). *Id.* A much more reasonable assumption  
9 is that a parent who had not authorized such purchases would respond to these notices by taking  
10 steps to prevent future unwanted purchases by enabling Parental Controls, by instructing or  
11 supervising the child, by limiting device use, or otherwise. *See id.*

12 Amazon's analysis conservatively corrects for the FTC's unreasonable  
13 assumption by not counting password failures occurring more than thirty days after a customer's  
14 initial failure as would-be unauthorized charges by a child. 5/27/2016 Werner Decl. ¶ 24. All  
15 failures within the thirty-day period are counted, without limit. *Id.* But failures beyond thirty  
16 days should not be treated as unauthorized child purchases because they reasonably would or  
17 should have been blocked by Parental Controls, been blocked by other limitations, or reasonably  
18 should be viewed as unrelated to attempted unauthorized purchases by a child. *Id.*

19 Since its April 20 Offer of Proof, Amazon has conducted further analyses of the  
20 data to confirm the accuracy and robustness of the results of its analysis. 5/27/2016 Werner  
21 Decl. ¶ 25. In doing so, Amazon discovered an error in the statistical software code it used to  
22 identify password failures more than thirty days after a customer's initial failure. *Id.* After  
23 updating the code, the effect of this restriction is smaller than estimated in the Offer of Proof and  
24 results in a reduction of the FTC's "Unauthorized Charge Rate" to [REDACTED]. *Id.* ¶ 25 & Ex. A.

1 (d) **Refund Percentage for Customer Contacts Identifying**  
2 **“Child” or “Accidental in Wrap-Up Codes**

3 Even after the application of the three rate corrections discussed above, the  
4 resulting estimate remains significantly inflated due to the FTC’s implausible assumption that all  
5 password failures are unauthorized attempts by a child to make a purchase. *See* 5/27/2016  
6 Werner Decl. ¶ 26. For example, the above corrections do not account for uncompleted purchase  
7 attempts (recorded as “failures” in the password data) that result from technical problems (e.g.,  
8 lost or slow Internet connection); children with authorization who forgot their parent’s password;  
9 children who changed their mind and closed a purchase window; or attempts by adults not  
10 identified by the partial corrections above, whether due to data limitations or the fact that many  
11 adults make in-app purchases on devices shared with children. *Id.* Nor do the corrections above  
12 address the fact that parents who learn of an in-app purchase after the fact may approve of the  
13 purchase at that time. *Id.*

14 To address this flaw, Amazon applies an additional correction. For those  
15 transactions within the corrected pool of potentially relevant revenue that have already been  
16 refunded, Amazon customer service agents classified [REDACTED] of the refunds (as a percentage of  
17 refunded dollars) with wrap-up codes that included the words “child” or “accidental.” 5/27/2016  
18 Werner Decl. ¶ 27. That is, at least [REDACTED] of these potentially relevant refunds were for  
19 reasons *other than child or accidental purchases*.<sup>12</sup> Applying that [REDACTED] figure to the rate above  
20 [REDACTED] further reduces the “Unauthorized Charge Rate” to [REDACTED]. *See id.* ¶ 27 & Ex. A.

21 c. **Corrected Estimate of Monetary Relief**

22 All told, applying the corrected “Unauthorized Charge Rate” [REDACTED] to the  
23 corrected revenue figure [REDACTED] results in an estimated [REDACTED] in “unauthorized”

24 <sup>12</sup> The percentage of refunds coded as child or accidental purchases is almost certainly high. Amazon  
25 customer-service agents are trained to take the customer’s word as true and have no way of verifying a customer’s  
26 statement that a child made a purchase, and some customers take advantage of Amazon’s generous refund practices.  
*See* 2/22/2016 Hanson Decl. (Dkt. 172), Ex. R (Pieros 30(b)(6) Dep.) 156:10-18.

1 purchases by children. 5/27/2016 Werner Decl. ¶ 29 & Ex. A. Amazon, however, has already  
2 refunded [REDACTED] for purchases in the corrected pool of potentially relevant revenue, leaving  
3 at most \$473,422 in unrefunded revenue from “unauthorized” purchases. *Id.* ¶ 29 & Ex. A.

4 **2. Alternative Estimate of Monetary Relief**

5 Amazon’s above analysis demonstrates that the FTC has not borne its burden of  
6 reasonably approximating Amazon’s alleged “unjust gains.” But even if the Court does not  
7 accept every one of Amazon’s corrections, the FTC’s estimate is still demonstrably overstated.  
8 For example, application of the June 2014 prompt, May 2013 prompt, and 30-day failure  
9 corrections in tandem (without further reduction for the percentage of refunds associated with  
10 wrap-up codes related to child and accidental purchases) reduces the “Unauthorized Charge  
11 Rate” to [REDACTED] and results in [REDACTED] in alleged injury and \$4,900,867 in estimated relief  
12 after known refunds. *See* 5/27/2016 Werner Decl. ¶ 30. Alternatively, simply applying the  
13 percentage of wrap-up codes related to child and accidental purchases [REDACTED] to the FTC’s  
14 proposed failure rate ([REDACTED], *see* note 9) reduces the “Unauthorized Charge Rate” to [REDACTED]  
15 and results in [REDACTED] in alleged injury and \$9,454,658 in relief after refunds. *Id.* In no  
16 event does the FTC’s requested relief of \$26.5 million withstand close scrutiny.

17 **B. An Appropriate Monetary Remedy Is a Notice-and-Claim Procedure With No Monetary Floor or Ceiling**

18 As confirmed by the corrections outlined above, Amazon continues to believe  
19 that, through its well-known and generous refund practices, the number of customers yet to be  
20 made whole is de minimis. Nonetheless, Amazon has always been and remains willing to refund  
21 any additional customers whose children accidentally made in-app purchases. Therefore, if the  
22 Court concludes that additional monetary relief is warranted in an amount that is not  
23 substantially lower than the FTC’s requested amount, the Court should reject entering a specific  
24 amount of relief and instead order a notice-and-claim procedure. Amazon made that same offer  
25 to the FTC before it filed this action.  
26



1 An appropriate notice-and-claims process would neither cap the total amount of  
2 available refunds nor set a minimum amount of payment. Instead, it would be designed to most  
3 accurately and efficiently ensure that any and all injured consumers are compensated without  
4 making guesswork out of the limited available data on which the FTC relies. If the FTC's goal  
5 truly is to identify any remaining deserving customers and to provide accurate refunds to those  
6 customers, a notice-and-claims process better achieves that result.

7 A claims process intended to provide redress to parents whose children made  
8 unwanted purchases should include the following protections against potential abuse:<sup>13</sup>

- 9 • Potentially eligible transactions would be those in the pool of potentially relevant  
10 revenue, after applying the corrections in Parts II.A.1.a(i)-(v), (vii).<sup>14</sup>
- 11 • Amazon would notify potentially eligible customers by email that they may be  
12 eligible for a refund if (1) they were charged for an in-app purchase by a child  
13 under the age of 13 (2) that they did not authorize and (3) that Amazon had not  
14 already refunded.<sup>15</sup>
- 15 • Customers submitting a claim would confirm they meet the eligibility conditions.
- 16 • For any refund claim exceeding \$20 the customer must limit the refund request to  
17 purchases made within a customer-selected 45-day window. A customer may  
18 request that the 45-day limit be extended by providing a specific explanation of  
19 the circumstances that allowed a child to continue to make unauthorized

19 <sup>13</sup> The potential for abuse is real. Data produced by Amazon show that, each month after July 2013, at least  
20 of customers receiving a refund for an in-app purchase within a “high-risk” app had previously received a  
21 refund and thus had already received education about parental controls. Expert Declaration of Dr. Ravi Dhar (Dkts.  
22 146-1, 149, 150, 173), Ex. 5-B.

21 <sup>14</sup> The corrections in Part II.A.1.a(vi) are not included because they are not tied to specific transactions.

22 <sup>15</sup> Restricting refund eligibility to purchases by children under the age of 13 is appropriate given the nature  
23 of the FTC's claim, which contends that in-app purchasing and virtual items were confusing to children who did not  
24 understand they were spending actual money. *See, e.g.*, FTC SJ Mot. (Dkt. 109), at 2. The FTC effectively  
25 concedes the appropriateness of this restriction, having (1) agreed in discovery to keyword search terms such as  
26 “under 13” and “pre-teen” and (2) instructed its expert Dr. Daniel Hamermesh to limit his analysis of injury for time  
spent seeking a refund to available data on households with children aged 3-13. Hanson Decl. ¶ 3; Hamermesh  
Report (Dkt. 103), at 5 (“I restrict the [Current Population Survey] sample to people who have children between  
ages 3 and 13 inclusive, thus matching these data as closely as the CPS allows to adults in households where  
children might have made unauthorized in-app purchases in the Amazon Appstore.”).

purchases despite repeated purchase notices to the customer.<sup>16</sup>

- Amazon may deny a refund request if there is sufficient, credible evidence of fraud by the customer.<sup>17</sup>
- Amazon will provide a requested refund for eligible purchases not already refunded within 14 days after a submitted claim or completion of a fraud investigation, whichever is later.<sup>18</sup>

### III. CONCLUSION

Because the FTC has failed to bear its burden of providing a reasonable estimate of harm, the Court should either deny the relief requested or substantially reduce the amount awarded. Alternatively, the Court should order a notice-and-claim procedure, as described in Amazon's proposed order. Amazon respectfully requests that the Court hold oral argument on this issue, with 30 minutes allocated to each party.

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<sup>16</sup> The 45-day window is a fair restriction and necessary to prevent individuals from unfairly exploiting a claims process. Within a 45-day period, a customer will have received at least two notices of each in-app purchase in the form of the immediate email confirmation sent by Amazon after each purchase and an entry on the customer's credit- or debit-card statement. Given these notices and the fact that neither of the parties nor the Court has a definitive way to confirm whether a customer seeking a refund in fact has children or whether particular purchases were made by a child, a 45-day window for claims exceeding \$20 is a fair and reasonable way to limit the volume of invalid claim requests that are unrelated to unauthorized purchases by children. This is the same standard approved by the court in the Northern District of California overseeing a claims process regarding in-app purchases made through Apple's app store. *See In re Apple In-App Purchase Litig.*, 2013 WL 1856713, at \*5 (N.D. Cal. May 2, 2013) (approving proposed class-action settlement that included provision limiting relief to "a single 45-day period for which [a class member] ha[d] not previously received a refund").

<sup>17</sup> Amazon fully refunded nearly all customers who contacted Amazon and said an in-app purchase was made by a child without authorization; the small number of exceptions were predominantly customers who previously received refunds or were engaging in fraud. *See Amazon's Opp. to SJ Mot. (Dkt. 167)*, at 14; 2/22/2016 Werner Decl. (Dkt. 168) ¶¶ 16-17.

<sup>18</sup> There are significant efficiencies gained by Amazon's administration of the claims process because, among other things, Amazon already has access to customer contact and credit-card information. The claims process would take longer and cost more if administered by a third party.

1 DATED: May 27, 2016

2  
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I certify under penalty of perjury that the foregoing is true and correct.

s/ Harry H. Schneider, Jr.